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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 5859

No. 6, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

(Under Order of December 3, 1951)

ERRATA

Page 7—substitute *post* pp. 25-26 for 36-37
subsitute *post* pp. 29, 40, 42-43 for 42, 59, 62

13—lines 23-25 should read: — territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not—

line 37, substitute —delimitation— for "elimination"

14—substitute *post* p. 24 for 34

16—substitute 377 for 97

17—substitute *post* p. 19 for 27

21—substitute *post* pp. 25-26 for 35-36

27—substitute *post* p. 30 for 43; ante p. 9 for 14

29—substitute *ante* p. 7 for 10; *post* pp. 40-43 for 59-62

30—substitute *post* pp. 35-37 for 51-53

35—substitute *ante* p. 17 for 24

37—substitute *ante* pp. 34-35 for 49-50

43—substitute—lay—for "law" (line 11 from bottom)

SUPREME COURT OF THE UNITED STATES

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No. 6, Original

UNITED STATES OF AMERICA,

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REPORT OF SPECIAL MASTER

(Under Order of December 3, 1951)

On December 3, 1951, the Court entered its order continuing the order of February 12, 1949 by which I was appointed Special Master herein and directing the Special Master "to conduct hearings and to submit to this Court with all convenient speed his recommended answers to the following questions, with a view to securing from this Court an order for his further guidance in applying the proper principles of law to the seven coastal segments enumerated in Groups I and II of the Master's Report of May 31, 1949, ordered filed June 27, 1949, pp. 1 and 2 of said Report." The three questions are:

> *Question 1.* What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

Question 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn?

Question 3. By what criteria is the ordinary low water mark on the coast of California to be ascertained?.

Hearings have been held and testimony taken in Washington, D. C. and Los Angeles, California, during January, February, March and April of this year. No oral testimony offered by either side was excluded. Some proffered documents were excluded as within the reach of judicial notice. However, the order of December 3, 1951 provided that any documents so excluded by the Special Master could be submitted in written form to the Court, to accompany, but not to be part of, the record of proceedings upon which the Master acted. By this procedure, no proffered documents were excluded from the Master's consideration. All proffered documents were either on the record or reached by the Master by way of judicial notice. Both parties have thus had unrestricted opportunity to present all the evidence, oral or written, that their own judgment dictated.[1]

After full and painstaking consideration of the oral testimony and of the documents referred to as well as many other documents in the field of international law, and of the briefs and the authorities cited therein, I recommend answers to the three questions as follows:

Question 1: The channels and other water areas between

[1] The documents to which the respective parties have particularly directed the attention of the Master are listed at pages VI, VIII, IX, X, XI and XII of the Brief for the United States Before the Special Master, hereinafter referred to by the letters "U.S." followed by the page reference; at pages II, III and IV of the Reply Brief for the United States, hereinafter referred to as "U.S.R.", with the page reference; and at pages VI, VII and VIII of the Brief for the State of California in the Proceedings Before the Special Master, hereinafter referred to by the abbreviation "Cal." followed by the page reference.

the mainland and the offshore islands within the area referred to by California as the "over-all unit area" [2] are not inland waters. They lie seaward of the baseline of the marginal belt of territorial waters, which should be measured in each instance along the shore of the adjoining mainland or island, each island having its own marginal belt.

Question 2: No one of the seven particular coastal segments now under consideration for precise determination and adjudication [3] is a bay constituting inland waters. The landmarks from which the lines marking the seaward limits (the straight-line segments of the baseline of the marginal belt) of bays, harbors, rivers and other inland waters are to be drawn, are as follows:

Bays

The extreme seaward limit of inland waters of a bay is a line ten nautical miles long. For indentations having pronounced headlands not more than ten nautical miles apart, and having a depth as hereinafter defined, a straight line is to be drawn across the entrance. Where the headlands are more than ten nautical miles apart, the straight line is to be drawn across the indentation at the point nearest the entrance at which the width does not exceed ten nautical miles. In either case the requisite depth is to be determined by the following criterion: The envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line shall be drawn from all points around the shore of the indentation; if the area enclosed by the straight line across the entrance and the envelope of the arcs of the

[2] Second chart opposite p. 30 of California's brief in this Court of July 31, 1951, entitled "Brief in Relation to Report of Special Master of May 22, 1951", and Chart Cal. Exhs. A and B.

[3] See Appendix I, Report of Special Master under Order of June 27, 1949.

circles is greater than that of a semicircle with a diameter equal to one-half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters; if otherwise, the waters of the indentation shall be regarded as open sea.

Harbors (Ports)

In front of harbors the outer limit of inland waters is to embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port, and, absent contrary evidence, may be assumed to be the line of the outermost permanent harbor works.

River Mouths

Where rivers empty into the sea, the seaward limit of inland waters is a line following the general direction of the coast drawn across the mouth of the river whatever its width. If the river flows into an estuary, the rules applicable to bays apply to the estuary.

Landmarks

Where pronounced headlands exist at tributary waterways, the appropriate landmark is the point of intersection of the plane of ordinary low water with the outermost extension of the natural headland. Where there is no pronounced headland, the landmark is the point of intersection of the ordinary low-water mark with a line bisecting the angle between the general trend line of the ordinary low-water mark along the open coast and the general trend line of the ordinary low-water mark along the shore of the tributary waterway.

Question 3: The "ordinary low-water mark on the coast of California" is the intersection with the shoreline (as it exists at the time of survey) of the plane of the mean of all

low waters, to be established, subject to the approval of the Court, by the United States Coast & Geodetic Survey from observations made over a period of 18.6 years.

The occasion for determination of these three questions by judgment of the Court arises in this way:

It had long been settled that individual states of the Union own in trust for their people the navigable tidewaters between high and low-water mark, and the soil or "tidelands" under them—*i. e.*, the shore that is covered and uncovered by the regular flow and ebb of the tides (*United States* v. *California*, 332 U. S. 19, 30; *Pollard* v. *Hagen*, 3 How. 212). California sought to have the *Pollard* rule of State ownership extended beyond the tidelands out into the soil beneath the marginal belt of territorial sea. The Court, refusing to thus transplant the *Pollard* rule, held that the Federal government rather than the State has paramount rights in and power over the marginal belt, and full dominion of the resources of the soil under it. In its decree the Court defined the things embraced within this Federal right as "the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters". Thus the line of demarcation between the tidelands owned by the State and the soil under the marginal belt over whose resources the United States has full dominion, is, under the Court's decision, "the ordinary low-water mark on the coast of California", subject only to the exception that wherever this low-water mark is interrupted by inland waters the seaward boundary of the inland water replaces the low-water line as an interpolated straight-line segment of the line of demarcation.

When the Court has answered Question 3 above as to how the low-water mark is to be chosen, the precise location of those portions of the desired line of demarcation which are

the low-water mark can readily be fixed by appropriate survey. It is the fixing of the interpolated segments where the low-water mark is interrupted by inland waters that calls for adjudication of Question 1 and 2.

As to Questions 1 and 2, the parties agree in recognizing that the determination of the demarcation line at which inland waters end and the marginal sea begins also determines the exterior limit of the marginal belt and therefore involves a question of the territorial jurisdiction of the United States as against foreign nations, *i. e.*, a question of external sovereignty.[4] In my consideration of appropriate answers to these questions I have understood that there is no controversy here as to the State's ownership—the status as inland waters—of bays not more than ten nautical miles wide and deep enough to meet the geometric formula (the Boggs formula) adopted in this case by the United States to measure its disclaimer.[5] And in formulating my recommendations I have assumed that appropriate answers to these questions of external sovereignty, involving as they do the degree of encroachment by the United States upon the open sea, depend upon whether any greater area of inland waters than is here conceded by the United States exists on the coast of California either by (1) any customary, generally recognized rule of international law which, like the three-mile marginal belt rule, for instance, exists for each country without needing the support of any particular assertion of right, or by (2) effective assertion by the United States on its own behalf in its international relations.[6]

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[4] U. S 20; Cal. Brief of July 31, 1951, p. 11.

[5] In any case, the areas disclaimed would be held inland waters under the ruling recommended in this report.

[6] In recommending answers to the three propounded questions for "guidance in applying the appropriate principles of law to the seven coastal segments enumerated", I have assumed that the purpose in hand is the judicial determination of applicable principles of law to serve as guides in the physical locating of the line of demarmation between the

Except for the special case of historical bays, and a minor point not now in significant controversy here as to an appropriate measure of the depth of indentation of a "bay" (see post p. 36-37), it is implicit in the positions taken by each of the parties, and in the documentary records to which they direct attention, that there is no customary, generally recognized rule of international law which establishes automatically as a matter of common right the criteria by which the baseline of the marginal belt is to be located.

Counsel for the United States, in support of the criteria they propose, stand fundamentally on the ground that the United States by effective assertion on its own behalf has established in its international relations the rule that the marginal belt is measured from the physical shore of the mainland, or of offshore islands, not from straight lines drawn from headland to headland or from point to point, but following the sinuosities of the coast except for deep indentations, such as bays, gulfs or estuaries, no more than ten miles wide. They do not, however, advance these criteria on the ground that they have acquired the authority of general rules of international law. Their position is that these criteria are in accord with the present and the traditional policy of the United States; that they are not in conflict with any established principles of international law;

State-owned tidelands and the Federally-owned submerged bottom of the marginal belt; not the determination of what might or might not be a wise policy for the nation to adopt within this field for which the political, not the judicial, agencies of government are responsible (*Cf. United States* v. *California*, 332 U.S. 19, 40; *The Paquette Habana*, 175 U.S. 677, 700). I remain of the conviction (reflected in my report of May 31, 1949 at page 5 and again in my report of May 22, 1951 at page 2) that the Court has already held that the location of the exact coastal line is a justiciable matter (332 U.S. 26). Counsel's argument that the Court's act in referring these questions back to the Special Master for recommended answers carries the implication that I should base my recommendations on what I think might be a wise policy for the United States to pursue within the limits of international law, has not appealed to me at all (Cf. post pp. 42, 59, 62).

that international law leaves the method of delimiting territorial waters to the national state within wide limits, and that these allowable limits clearly embrace the criteria here relied upon by the United States (U. S. 90). They say, correctly enough, that California's insistence upon more extensive areas of inland waters amounts to recognition that the criteria proposed by the United States *do not go beyond* what is permissible under international law.

California, on the other hand, proposes that the United States now adopt as the baseline of its marginal belt a line, referred to as the "exterior" or "political" coastline, running outside "all ports, bays, harbors, and other bodies of inland waters and along the seaward side of the outlying rocks and islands"; but it does not contend that any customary, generally recognized rule of international law *requires* such a line. Its position is not that international law imposes an obligation on the United States to adopt the criteria California proposes, but rather that there is no rule of international law that would prevent the United States from adopting those criteria if it should desire to do so. Thus California's position as to the non-existence of any customary, generally recognized, and limiting rule of international law on this point coincides with the position of the United States.

The absence from international law of any customary, generally accepted rule or rules fixing the baseline of the marginal belt is, indeed, conspicuous. At the Hague Conference of 1930, a carefully prepared attempt was made to reach agreement on some such rules among the maritime nations there represented, but the attempt failed. The recent decision of the International Court in the United Kingdom-Norway controversy seems to make a step in that direction, and it may be that by such judicial procedure further progress may eventually be made in this presently

undefined area of international law. But for the time being it must be conceded that no such customary or generally recognized rule exists.

Under these circumstances, adjudication of the status of the water areas here in controversy must depend upon whether there has been effective assertion by the United States in its international relations of the criteria proposed by California; and this question will be answered by judicial examination of prior actions of the United States, having due regard to relevant principles of international and domestic law (*Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, 380-381).

The Present and Past Position of the United States

Turning, then, to the question whether the criteria proposed by California are supported by any effective assertion by the United States on its own behalf in international relations, we have first to examine the testimony and the documentary records in this regard.

Counsel for the United States put into the record before the Special Master a letter dated November 13, 1951 and a supplementing letter of February 12, 1952, from the Secretary of State to the Attorney General (U. S. Appendix pp. 167-175).

The first of these letters is a statement from the Department of State in response to a request from the Attorney General, of the position of the United States as to principles or criteria which govern the delimitation of the territorial waters of the United States. The Attorney General asked in particular how such delimitation is made in the case of:

(a) A relatively straight coast, with no special geographic features, such as indentations or bays;

(b) A coast with small indentations not equivalent to bays;

(c) Deep indentations such as bays, gulfs or estuaries;

(d) Mouths of rivers which do not form an estuary;

(e) Islands, rocks or groups of islands lying off the coast;

(f) Straits, particularly those situated between the mainland and offshore islands.

The supplementing letter was in response to an inquiry from the Attorney General as to whether, in the light of the decision of the International Court of Justice in the Fisheries case in December 1951 (*United Kingdom* v. *Norway*), the State Department adheres to the statement of position in its letter of November 13, 1951.

The letter of November 13, 1951, after noting that the Department of State, in the formulation of United States policy with respect to territorial waters and their delimitation, "has been and is guided by generally accepted principles of international law and by the practice of other states in the matter" (167-168), said, with respect to item (a)—a relatively straight coast, with no special geographic features, such as indentations or bays—that the Department of State "has traditionally taken the position that territorial waters should be measured from the low-water mark along the coast" (168).[7] As to item (b)—a coast with small indentations not equivalent to bays—the letter says that the Department of State has taken the position that "the base line follows the indentations or sinuosities of the coast, and is not drawn from headland to headland" (169). As to item (c)—a coast presenting deep indentations—the letter says (169) that the determination of the baseline in such cases has frequently given rise to controversies, but:

> "The practice of states, nevertheless, indicates substantial agreement with respect to bays, gulfs or

[7] Each of the assertions of this letter is fortified by references to specific instances in which the position is said to have been asserted or maintained.

> estuaries no more than 10 miles wide; the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles."

And the Department notes that the 10-mile rule is subject to the special case of historical bays (169-170). As to item (d)—mouths of rivers which do not flow into estuaries—the Department mentions the report of the Second Sub-Committee at The Hague Conference of 1930 as having "agreed to take for the baseline a line following the general direction of the coast and drawn across the mouth of the river, whatever its width (*Acts of Conference,* 220)." There is no dispute between the parties as to this item. As to item (e)—islands, rocks or groups of islands lying off the coast—the letter says (171) that at The Hague Conference of 1930 the United States took the position that "Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland (*Acts of Conference,* 200)." As to the definition of an island the letter says that "separate bodies of land which were capable of use should be regarded as islands," and notes that the report of the Second Sub-Committee defined an island "as a separate body of land, surrounded by water, which was permanently above high water mark, and approved the principle that an island, so defined, had its own belt of territorial sea (*Acts of Conference,* 219)." As to item (f)—straits, particularly those situated between the mainland and offshore islands—the letter (172) says that the United States took the position at the Conference that "if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of open-

ings wider than six miles, the belt of territorial waters should be measured in the ordinary way (*Acts of Conference,* 200-201)." The straits here in controversy are of this character, i.e. the openings are wider than six miles. The Department noted that the Second Sub-Committee:

> "* * * specified in its observations on this subject that the waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state (*Acts of Conference,* 220). In this, it supported the policy of the United States to oppose claims to exclusive control of such waters by the nation to which the adjacent shore belonged. * * * With respect to a strait which is merely a channel of communication to an inland sea, however, the United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (*Acts of Conference,* 201, 220)."

And here again, the Department noted that the principles applicable to bays and straits "have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority."

In the supplementary letter of February 12, 1952, with reference to the decision of the International Court of Justice in the *Fisheries* case, the Department said that it adheres to the statement of position given in the letter of November 13, 1951. The Department noted that in the *Fisheries* case the International Court of Justice held that Norway's fixing of the baselines for the delimitation of Norwegian fisheries by applying the straight baselines method had not violated international law, especially in view of the peculiar geography of the Norwegian coast and of the consolidation of this method by a constant and sufficiently long practice, but it said that the decision—

"does not indicate, nor does it suggest, that other methods of delimitation of territorial waters such as that adopted by the United States are not equally valid in international law. The selection of the baselines, the Court pointed out, is determined on the one hand by the will of the coastal state which is in the best position to appraise the local conditions dictating such selection, and on the other hand by international law which provides certain criteria to be taken into account such as the criteria that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast, that the inclusion within those lines of sea areas surrounded or divided by the land formations depends on whether such sea areas are sufficiently closely linked to the land domain to be subject to the regime of internal waters, and that economic interests should not be overlooked the reality and importance of which are clearly evidenced by long usage.

"In the view of the Department, the decision of the International Court of Justice in the Fisheries case does not require the United States to change its previous position with respect to the delimitation of its on which this United States position has been traditerritorial waters. It is true that some of the principles tionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that the baseline follows the sinuosities of the coast and the principle that in the case of bays no more than 10 miles wide, the baseline is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States, with respect to elimination of its territorial waters in date of November 13, 1951." (174-5)

Bays

The Department of State in its letter of November 13, 1951 first cites (168) a letter from Secretary of State Bayard to Secretary of the Treasury Manning of May 28, 1886 (U.S. Appendix 175-181). The first part of this letter is directed to the limitation of the marginal belt to a width of three miles; a question which is not here in controversy. Following that, Secretary Bayard directs his attention to the question "Whether the line which bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland * * *" (177). He says that "The headland theory, as it is called, has been uniformly rejected by our Government, * * *" and notes (176) in support of this assertion the opinions expressed in diplomatic correspondence by various Secretaries of State; a statement of Judge Woolsey in his work on international law, and an opinion of Umpire Bates of the London Commission of 1853.[8] He adds, referring to the so-called headland theory:

> "This doctrine is new and has received a proper limit in the convention between France and Great Britain of the 2d of August, 1839, in which it is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.
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> * * * * *
>
> "We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the

[8] These letters of the Secretaries asserted the three-mile limitation of the marginal belt. They spoke of the three miles as measured from the "shore" (U.S. 55-56) and two of them, Jefferson in 1793 and Pickering in 1796, spoke of "landlocked" bays (U.S. 77, 78 and post p. 34). The Bayard letter (177) includes relevant quotations from Judge Woolsey and from Umpire Bates.

> position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign." (177-178)

At the end of his letter Secretary Bayard said:

> "These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We cannot refuse them to others on our northwest coast, where the sceptre is held by the United States." (181)

The controversy between Great Britain and the United States to which Secretary Bayard's words refer lasted throughout the nineteenth century; indeed, from the Treaty of Paris to the Treaty of July 12, 1912 following the decision and recommendations of the Arbitration Tribunal of September 7, 1910 in the *North Atlantic Coast Fisheries* case.[9] It gave occasion for the United States repeatedly to assert its position as to the location of the baseline of the marginal belt. The position maintained by the United States throughout the controversy was that the line of demarcation is the low-water mark following the sinuosities of the coast, excluding any straight-line measurement from headland to headland of bays. The arbitration was on a clause of the Treaty of October 20, 1818 which provided that "the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants

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[9] See Jessup, P. C., *The Law of Territorial Waters and Maritime Jurisdiction*, p. 363 *et seq.*

thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits". The British representatives interpreted this treaty provision to exclude American fishermen from all bays regardless of their size and claimed that the limit described in the treaty should be measured three miles from a line drawn from headland to headland. The United States contended that the word "bays" in the treaty meant those smaller indentations which would naturally be classed with creeks and harbors. Mr. Elihu Root, speaking for the United States, advocated the six-mile rule for measuring bays; limiting the headland-to-headland doctrine by the three-mile rule. The decision of the Court of Arbitration on this question was unfavorable to the United States. The American interpretation of the Treaty of 1818 was rejected and the Court held that:

> "In case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it *ceases to have the configuration and characteristics of a bay.* At all other places the three marine miles are to be measured following the sinuosities of the coast". (Italics supplied) [10]

Expressing, however, the feeling that though this decision was correct in principle, it was "not entirely satisfactory as to its practical applicability", the Arbitration Tribunal went on to recommend, as it was empowered to do, that the parties to the controversy should agree specifically as to the exclusive fishing rights in certain named bays, and that:

> "1. In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance as the first point where the width does not exceed ten miles."

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[10] *Ibid.*, p. 97.

This recommended disposition of the dispute was incorporated in the Treaty of 1912 between the United States and Great Britain (Senate Document 348, 61st Congress, 4th Session, Vol. 3, 2635).

The ten-mile rule incorporated in the 1912 treaty was thus a recession by the United States from its position that inland waters were limited by the three-mile marginal belt rule to bays six miles wide. In the 1912 treaty the ten-mile rule was accepted by the United States as a "proper limit" upon the headland-to-headland doctrine, to use the expression chosen by Umpire Bates in 1853 (post p. 27) and adopted by Secretary Bayard in his letter of May 28, 1886 (U.S. Appendix 177-178).

The rule had a very considerable background, particularly in the usage of Great Britain and other countries bordering on the North Sea with respect to fisheries. The Arbitration Tribunal in recommending the ten-mile rule expressly took into consideration[11] the fact that Great Britain had adopted the rule in treaties with France and with the North German Confederation and the German Empire, and likewise in the North Sea Convention; that it had on various occasions in the course of negotiations with the United States proposed and adopted the rule in instructions to its Naval Officers stationed on the northeastern coast, and that the rule had already formed the basis of a treaty between Great Britain and the United States, negotiated in 1888 by Secretary Bayard.[12] Dr. Drago dissented from the majority award of the Arbitration Tribunal, believing that it should have adopted the ten-mile rule as to bays. His dissenting opinion quotes the provisions of a series of these British treaties and regulations incorporating that rule in 1839, 1843, 1867, 1868, 1874, 1882 and

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[11] *Ibid.*, p. 377.

[12] This treaty was never ratified by the Senate.

1887 [13] and refers also to the unratified Treaty of 1888.

It appears from the historic documents referred to by Jessup and others that throughout the nineteenth century Great Britain adhered to the idea of following the sinuosities of the coast, but sometimes proposed the more restrictive six-mile rule.[14] One instance of this was a question asked in Parliament on February 25, 1907 in which the Foreign Office, Admiralty, the Colonial Office, the Board of Trade and the Board of Agriculture and Fisheries, stated, perhaps as a minimum, the six-mile rule.[15] In connection with it Dr. Drago referred to the comment of John Bassett Moore in a letter quoted in 13 (1894-95) *Annuaire de L.S. Institute de Droit Int.*, p. 146, to the effect that the ten-mile rule was no more than a practical application of the six-mile rule to the necessities of fishermen.[16] And Dr. Drago (111) expressed his opinion that:

> "The six miles are the consequence of the three miles marginal belt of territorial waters in their coincidence from both sides at the inlets of the coast, and the ten miles far from being an arbitrary measure are simply an extension, a margin given for convenience to the strict six miles for fishery purposes."

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[13] Treaty between Great Britain and France, 2d August, 1839; Regulations between Great Britain and France, 24th May, 1843; Treaty between Great Britain and France, November 11, 1867; British Board of Trade Notice to fishermen under the regulation agreed to between Great Britain and the North German Confederation, November 1868, repeated in December 1874 under the arrangement between Great Britain and the German Empire; Treaty between Great Britain, Belgium, Denmark, France, Germany and The Netherlands for regulating the police of the North Sea Fisheries, May 6, 1882; British Order-in-Council, October 23, 1887 (*ibid.*, pp. 107-108).

[14] *Ibid.*, 366, 380.

[15] Pitt Cobbett, *"Cases and Opinions on International Law"*, Vol. I, p. 143, and this instance is noted by Dr. Drago in his dissenting opinion at pages 110-111.

[16] *Ibid.*, 356.

In February 1853 Umpire Bates in the case of *The Washington* had reached the same conclusion as that of Dr. Drago's dissent. He rejected the contention of the British Government that the term "bays" in the Treaty of 1783, which used the same words as the Treaty of 1818, included the waters landward of lines drawn from headland to headland along the coast, using the expression subsequently adopted by Secretary Bayard in his letter of May 28, 1886, that "This doctrine [of headlands] is new, and has received a proper limit in the convention between France and Great Britain of the 2nd of August 1839", which incorporated the ten-mile rule (IV Moore, *International Arbitrations,* 4342; I Moore, *Digest of International Law,* 785, 786). The Netherlands in its neutrality proclamation during the Russo-Japanese War adopted the ten-mile rule.[17] In 1903 the United States took the position in the Alaska Boundary Arbitration that a ten-mile limit for bays is proper (7 *Alaska Boundary Arbitration,* S. Doc. 162, 58th Congress, 2d Session, p. 844). A French law of March 1, 1888 regulating fisheries incorporated the ten-mile rule (Crocker, 525-6).

The rule that the baseline of the marginal belt follows the sinuosities of the coast interrupted only by definitely limited straight lines across the mouths of bays has been widely commented upon and approved by jurists experienced in international law.[18] In 1894 the Institute of International Law adopted the principle that the territorial sea follows the sinuosities of the coast except that it is measured from a straight line drawn across the bay. The limit incorporated in the rule was twelve marine miles rather than ten (Jessup, *The Law of Territorial Waters*

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[17] Jessup, 360; 1904, *For. Rel.,* U.S. 27.

[18] The recommendations of the national and international associations referred to are accompanied in many cases by rather extensive comments in the journals and reports cited in the text.

and Maritime Jurisdiction, 361; Crocker, *Extent of the Marginal Sea,* 148). In 1895 the International Law Association followed suit but used the ten-mile measure (*Transactions,* 1873-1924, 223). The Third Commission of the Second Hague Peace Conference in 1907 in its report relative to the laying of automatic submarine contact mines recommended the ten-mile rule (Scott, *Reports to The Hague Conference* of 1899 and 1907, 664; Crocker, 487, 491). And as Jessup notes (362) the League of Nations Committee of Experts for the Progressive Codification of International Law suggested in Article 4 the rule that the baseline of the marginal belt should follow the sinuosities of the coast except where it is interrupted by straight lines drawn across bays putting the limit at twelve marine miles.

The Secretary of State in his letter of November 13, 1951 further refers, in support of the ten-mile rule (U.S. Appendix, 170) to the Research in International Law of the Harvard Law School. That research was organized in November 1927 for the purpose of preparing a draft of an international convention on certain subjects as to which the Council of The League of Nations, through its Preparatory Committee for the International Codification Conference, had addressed inquiries to various governments. Its report of 1929 recommended, in Article 5 of the section on the Law of Territorial Waters, Part III, the adoption of the ten-mile rule subject, of course, to the existence of so-called "historic bays" (Am. J. of Int. Law, Vol. 23, 1929, p. 265, et seq.). The wording of Article 5 was:

> "The seaward limit of a bay or river-mouth the entrance to which does not exceed ten miles in width is a line drawn across the entrance. The seaward limit of a bay or river-mouth the entrance to which exceeds ten miles in width is a line drawn across the bay or river-mouth where the width of the bay or river-mouth first narrows to ten miles."

The article is followed by a rather full commentary by a distinguished group of American experts in the field of international law.

As the November 13, 1951 letter of the Secretary of State points out, the ten-mile rule was supported at The Hague Conference of 1930 by the United States, and it was incorporated in the Report of the Second Sub-Committee (*Acts of Conference,* 217-218).

On the foregoing facts I come without any embarrassment of doubt to the conclusion that, subject to the special case of historical bays, the United States has traditionally taken the position that the baseline of the marginal belt is the low-water mark following the sinuosities of the coast, and not drawn from headland to headland, except that at bays, gulfs or estuaries not more than ten miles wide the baseline is a straight line drawn across the opening of such indentations, or where such opening exceeds ten miles in width, at the first point therein where their width does not exceed ten miles; and that it has not in its international relations asserted the criteria proposed by California or any criteria that would mark as inland waters any greater water area on the coast of California than is here conceded by the United States, except for a possible but not now significant hiatus as to the depth of bays, discussed hereinafter (post pp. 35-36).

In thus reviewing the record and expressing the considerations which have led me to make the foregoing recommendations, I have not overlooked the fact that counsel for the United States take the position that this Court cannot go behind or disregard the State Department's declaration of what its policy now is or what it has been in the past (U.S. 12-50). While I assume that with respect to what the policy of the United States now is in international relations this Court will accept without question the statement of the Secretary of State, I am not convinced that

the absolute statement of the rule by counsel for the United States (U.S. 36) as to what the policy of the United States has been in the past has no exceptions; particularly in view of the fact that, after all, the policy of the United States in its international relations is expressed perhaps more often by acts than by policy declarations, and here we are particularly concerned with what the policy was on October 28, 1947, when the decree in this case was entered. I do not think that any of the cases cited by counsel or any others that I have been able to find go quite that far (Cf. *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 380). If I am wrong about that, and counsel for the United States are right, then the Court will act accordingly. In that event the conclusion would be the same as the one I have reached, although reached by a somewhat different route.

Counsel for the United States have also taken the position (U.S. 50-53) that Dr. Hudson's testimony in which he criticized the State Department's letters is irrelevant and should not be considered. I have not accepted that argument or followed that course. On the contrary, I have examined with the greatest care the testimony of Dr. Hudson (Tr. 65-214). I have not, however, found anything in it which significantly impeaches or contradicts anything in the two letters from the Secretary of State. I think that every criticism Dr. Hudson makes as to the accuracy of the recital by the Secretary of State of the traditional policy of the United States is more than amply covered by a remark included in the opinion of the International Court of Justice in the *Anglo-Norwegian Fisheries* case and quoted with approval, on different points of argument, both by counsel for the United States (U.S.R. 19) and by counsel for California (Cal. 50, Fn. 13):

"The Court considers that too much importance need not be attached to the few uncertainties or con-

> tradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice".

It should be added that a great part of Dr. Hudson's testimony is taken up with his comments on the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case (Tr. 70-108). He noted in his comments, as the Secretary of State noted in his supplementing letter of February 8, 1952, that the principles (1) that the baseline follows the sinuosities of the coast and (2) that in the case of bays not more than ten miles wide the baseline is a straight line across their opening, were deemed by the International Court not to have acquired the authority of a general rule of international law. That may be assumed to be true. Although the rule has been adopted by Great Britain and the other countries bordering the North Sea, except Norway, and by the United States, it does not by any means appear that it has been adopted universally by maritime nations. Indeed, counsel for California in their brief (Cal. 117) list a number of nations which are said to claim all bays without regard to their size or configuration.

The above-discussed present and traditional position of the United States in its international relations corresponds, so far as it goes, with the position taken here by counsel for the United States as to the appropriate answers to the questions under discussion. It does not go the whole way as to the criteria which determine whether a coastal indentation is a bay constituting inland waters, because the position of the State Department does not include any particular formula or method for determining whether the coastal indentation is sufficiently deep to have the character of a bay.

The concept of a bay as inland waters over which a country has some natural or reasonable right to exercise exclu-

sive jurisdiction has often been expressed vaguely but understandably by use of the word "landlocked" (*Cf.* 332 U.S. 34). Thus in a letter of November 8, 1793 to the British Minister (I Moore, *Digest of International Law,* 702-703) Mr. Jefferson referred to rivers and bays "as being landlocked, within the body of the United States". And on September 2, 1796, Mr. Pickering (*Ibid.* 704) excepted from the marginal belt "any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may", and in my opinion the same concept is reflected in the criterion expressed in the judgment of the International Court of Justice in the Fisheries case (p. 133) as the "idea, which is at the basis of the determination of rules relating to bays", namely, "whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters". But it is quite clear that this concept has not yet found concrete expression in any generally accepted rule or formula of international law.

On this subject the State Department letter of November 13, 1951 says, referring to The Hague Conference of 1930 (170):

> "It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (*Acts of Conference,* 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded as a bay to which the 10 mile rule would apply (*Acts of Conference,* 197-199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered by the French delegation in its report, but gave no opinion regarding these systems (*Acts of Conference,* 218-219)".

The statement reflects (1) the existence of the question: When is a coastal indentation deep enough or of such configuration as to constitute an area of inland waters, and (2) the fact that no consensus was reached on this question at The Hague Conference. The American proposal referred to in the State Department letter was the Boggs formula upon which counsel for the United States rely in these proceedings as an appropriate method of answering this question. But so little has the drawing of a precise line of demarcation between inland waters and the marginal belt engaged attention in international relations that there is nothing that could be thought of as an accepted rule of international law as to the required depth of inland bays. The concern of the members of the Second Sub-Committee at The Hague Conference of 1930 with this question, as well as their failure to reach any consensus about it, is reflected not only in the above quotation and in their failure to reach agreement, but also in the observation on bays (*Acts of Conference,* 218) that "Most delegations agreed to a width of ten miles provided a system were simultaneously adopted under which slight indentations would not be treated as bays". It is clear, however, from the letter of the Secretary of State of November 13, 1951 that the State Department is not now prepared to say that the Boggs formula represents either at present or traditionally a definitive position of the United States on this detail. The position of counsel for the United States in these proceedings is not that the geometric formula proposed at The Hague Conference, and upon which the United States now stands as an appropriate measure, has been established either as a general rule of international law or even as the traditional position of the United States in international law (U.S. 35).

A question *might* arise, under such circumstances, as to the status of the waters of a coastal indentation less

than ten miles wide but not deep enough to satisfy the Boggs formula. But no such question has *arisen* in these proceedings.[19] California accepts, of course, the concession or disclaimer of the United States so far as it goes, and it has not called attention to any coastal indentation which would be admitted to the status of inland waters by the ten-mile rule without limitation but would be excluded from that status for lack of depth under the Boggs formula. This modicum of difference between the criteria urged in this case on behalf of the United States and any definitive position taken by the State Department in our international relations is, therefore, without present significance in this controversy. My recommendation is that the Boggs formula should be accepted, for the present purposes of this case, as an appropriate technical method of ascertaining whether a coastal indentation has sufficient depth to constitute inland waters within the limitations of the ten-mile rule.

Islands Lying Off the Coast

The letter from the Secretary of State of November 13, 1951 says (U. S. Appendix, pp. 167-175) that at The Hague Conference of 1930 the United States took the position that each offshore island was to be surrounded by its own belt of territorial waters, and that this principle was approved in the Report of the Second Sub-Committee.

The rule that the baseline of the marginal belt follows the sinuosities of the coast, except where interrupted by straight-line segments not more than ten miles wide across the mouths of bays, in itself excludes the idea of drawing the coastline from headland to headland around offshore

[19] The controversy as to the Crescent City Bay area nine-tenths of a mile deep landward of a line three and one-half miles long (Cal. 86; U.S.R. 55-57) turns on the proper measurement of a harbor rather than on any application of the Boggs formula.

islands. That each offshore island should have its own three-mile belt goes naturally with the fact that these islands are part of the territory of the nation to which the mainland belongs. No one, for instance, questions that the islands lying off the southern coast of California are part of the State of California, and as such each of them is, of course, entitled to its three-mile marginal strip (*cf. In re Marincovich*, 48 Cal. App. 474, 478). Subject to the special case of historical waters (post p. 43) it seems clear enough that the rule stated by the Secretary of State in his letter of November 13, 1951 is and has traditionally been the position of the United States in international relations, and I have therefore included in my recommended answer to Question 1 offshore islands as well as the mainland.

Straits

Subject to the special case of historical waters, the position of the United States as to straits connecting two areas of open sea, as set forth by the Secretary of State (*ante* p. 14), is that if both entrances are less than six nautical miles wide the strait is territorial waters but never inland waters. Otherwise, the marginal belt is to be measured in the ordinary way. If the strait is merely a channel of communication to an inland sea the ten-mile rule regarding bays should apply. The channels between the offshore islands and the mainland in the so-called "unit area" claimed by California connect two areas of open sea.

To support his statement as to straits the Secretary refers (U. S. Appendix 172) to the position taken by Secretary Evarts on January 18, 1879 in connection with the passage through the Straits of Magellan (I Moore, *Digest of International Law*, 664). Counsel for the United States additionally cite (U. S. 67) a communication from Secretary of State Buchanan to the Minister of Denmark

of October 14, 1848 (H. Ex. Doc. 108, 33rd Congress, 1st Session, p. 38; I Moore, Digest of International Law, 660) protesting the levying by Denmark of dues on United States vessels passing through the Danish sound and belts from the North Sea to the Baltic, which ultimately led to the Treaty of April 11, 1857 (11 Stat. 719) by which complete freedom of navigation for American vessels in the Danish straits was established; and a letter from Mr. Jackson, United States Consul at Halifax, of October 3, 1870, insisting on the freedom of passage through the Strait of Canso from the Gulf of St. Lawrence to the Atlantic Ocean between Cape Breton Island and the mainland of Nova Scotia (U. S. 68-69; *"Foreign Relations"*, 1870, pp. 428, 430; see, also, I Moore, *Digest of International Law*, 789-791). The recommendations of the United States at The Hague Conference of 1930 on the subject of straits (*Acts of Conference*, 200) are quoted on page 70 of the United States brief.

Counsel for the United States further assert that the position of the United States with respect to straits has been completely in accord with the established rule of international law, citing a number of authorities (U. S. 71). They stress particularly the recent ruling in a decision of the International Court of Justice in the *Corfu Channel Case* (I.C.J. Reports 1949, p. 4) in which Great Britain was successful in having Albania held responsible for damages sustained by two British warships which struck mines while proceeding through the North Corfu Channel at a point within the territorial waters of Albania. The Strait of Corfu between the Greek Island of Corfu and the mainland is less than six miles wide at each end (U. S. 72-74; Hudson, *The Twenty Eighth Year of the World Court*, 44 A.J.I.L. 1-12). The pertinent extract from the opinion of the Court is quoted in the brief for the United States at pages 73-74. California in its brief filed in this

Court in relation to the Report of the Special Master of May 22, 1951, at page 41, takes the position that if Corfu Island had been part of the country of Albania "this channel could have been declared inland waters"; but I agree with counsel for the United States (U. S. 75) that this is an unsound distinction.

In its brief addressed to the Special Master on June 6, 1952 California (118-121) discusses the matter of channels. Counsel suggest that many nations have found it advantageous to adopt an "exterior" coastline extending around off-lying islands as the baseline of the marginal sea; that the exterior coastline as a base for the marginal sea depends in each case upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance, and that the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters. It is true that some countries have adopted such an "exterior" coastline. Norway is an example. It is also clearly correct to say that the establishment of such a coastline depends in international law upon effective assertion of right by the particular State. Whether the United States is free to take the position advocated by California if it finds that it is in the national interest to do so, and whether that would in fact be in the national interest as argued for California (Cal. 119-121) is in my judgment beyond anything submitted to me for consideration by the order of the Court (ante p. 10 and post p. 59-62).

On the whole case as submitted I have, therefore, no hesitation in recommending to the Court that in its answer to Question 1 it should find that, subject to the special case of historical waters, the channels and other water areas between the mainland and the offshore islands lying off the southern coast of California are not inland waters.

Historical Waters

In my consideration of this aspect of the case I have assumed that the establishment of an historical right to encroachment upon the open sea greater than the ten-mile rule hereinbefore discussed essentially depends upon an assertion of right by the interested nation.[20] The question to be answered is whether there has been any effective assertion by the United States of exclusive jurisdiction, or any exercise by it of exclusive authority, over the "over-all unit area of inland waters", or over the five important bays within the seven segments under consideration, claimed by California as inland waters; *i. e.*, Monterey Bay, Crescent City Bay area, San Luis Obispo Bay, Santa Monica Bay and San Pedro Bay.

With the exception of the anomalous incident of the *amicus* brief in the *Stralla* case (post p. 51-53) there is no evidence that the United States has ever exercised exclusive authority or asserted exclusive jurisdiction in any of these areas beyond the three-mile marginal belt delimited as hereinbefore defined.

Answer to that question must, therefore, depend upon whether acts of California can take the place of, or amount to, effective assertion by the United States. Counsel for California contend that the "effect * * * of an assertion or exercise of jurisdiction by the State of California * * * is the same as if the action had been taken by the United States".[21] Counsel for the United States, on the other hand, take the position that since individual States of the Union have no capacity to deal with external affairs or foreign relations no effect whatever should be given in these proceedings to assertions made by the State (U. S.

[20] Cf. U.S. 29; Cal. 9, 19 and the argument of Elihu Root in the *North Atlantic Coast Fisheries Case Proceedings*, Vol. XI, quoted by Jessup in *The Law of Territorial Waters and Maritime Jurisdiction*, at pp. 368-369.

[21] Brief filed by California before Special Master, March 14, 1952, p. 2.

110).[22] Behind this interesting question of constitutional law lies the factual question whether California has, in fact, asserted or exercised exclusive authority over the water areas in question. Counsel for the United States aver that the past assertions of jurisdiction over coastal areas by California do not support its present position (U. S. 133 *et seq.*).

On the evidence submitted, I have reached the conclusion, as will presently appear, that no explicit assertion by California of exclusive authority over these water areas in dispute was ever made until in 1949 the Government Code of California declared that the boundary described in the Constitution runs three English miles seaward from the islands, rocks and reefs adjacent to the mainland, etc. (1949 Cal. Stats., Chap. 65; Cal. 56).

On the question of constitutional law propounded I agree with counsel for the United States that when the action of a State is actually contrary to action by the Federal Government the action is invalid for the reason that it is in conflict with the superior authority of the United States (U. S. 110 and 128-129). But whether no effect whatever should be given to an assertion or exercise of exclusive authority by an individual State affecting citizens of foreign states, is a question that does not arise in these proceedings if my factual conclusions are correct. I do not, therefore, think it would be useful, or even appropriate for me to express any opinion on that subject; particularly in view of the fact that in the Louisiana case (239 U. S. 705) in passing upon the effect of Louisiana's claims *vis-á-vis* the United States or those acting on behalf of or pursuant to its authority, this Court expressly noted that it intimated no

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[22] Counsel do not question that assertions by a State would be an appropriate element to be considered by the State Department, as evidence of long usage, if the State Department did assert for the United States the item of external sovereignty in question (U.S. 127).

opinion as to the effect of such actions by a State *vis-á-vis* persons other than the United States and its agents.

As to the facts, California has asserted the right to control fishing within the waters of Monterey Bay and the right to enforce its criminal laws within the waters of Santa Monica Bay, up to and three miles beyond a straight line drawn from headland to headland of those bays. The incidents of these assertions of right appear with respect to Monterey Bay in *Ocean Industries* v. *Greene,* 15 Fed. (2d) 862 and *Ocean Industries* v. *Superior Court,* 200 Cal. 235 and as to Santa Monica Bay in *People* v. *Stralla,* 14 Cal. 2d 617.

In *Ocean Industries, Inc.* v. *Greene, et al.* (15 F. (2d) 862, N. D. Cal., S. D., St. Sure, D. J.), decided November 13, 1926, Ocean Industries sought to enjoin Greene, individually and as an officer of the state of California, from interfering with the operation of plaintiff's fish reduction plant anchored within the indentation of Monterey Bay shoreward of a straight line drawn between its headlands, which are nineteen miles apart. Judge St. Sure denied the injunction for lack of jurisdiction on the ground (1) that California had jurisdiction because its Constitution included in the boundaries of the State harbors and bays, and its statute establishing Fish and Game Districts covered Monterey Bay within one of those districts; and (2) there had been no affirmative action of Congress taking such control of these areas. He interpreted the language of the Constitution of California, "all the islands, harbors and bays along and adjacent to the coast" to declare in effect that Monterey Bay is a part of the territory of the State; he found that there is in international law no established six-mile limitation of the distance between headlands of bays, supporting that finding by reference to the internationally recognized status of Chesapeake Bay, Delaware Bay and Cape Cod Bay in this country and Conception Bay in Newfoundland. He

resolved the ambiguity of statutory language defining the boundaries of the Fish and Game districts, "under the circumstances", in favor of including the whole bay. When, in January, 1927, the Supreme Court of California in *Ocean Industries, Inc.* v. *Superior Court* (200 Cal. 235) gave judgment on this same question it held that the place of anchorage was within the boundaries of California on essentially the same grounds; the word "bays" in the California Constitution was interpreted to embrace the entire area of all the bays indenting the coast, regardless of their size (243); the ambiguity of statutory language defining county boundaries was resolved by reference to the Constitution so interpreted (243-244), and the six-mile limit on the headland rule in international law was questioned by reference to Conception Bay, Newfoundland, Cancale Bay in France and Delaware and Chesapeake Bays in the United States (245-246). In August, 1935, the U. S. District Court for the Southern District of California, Central Division (Stephens, D. J.) in *U. S.* v. *Carrillo, et al.* (13 F. Supp. 121), dismissed certain counts of an indictment charging defendants with violation of a Federal statute by acts of piracy on the high seas. The acts were committed on a vessel in San Pedro Bay more than three miles from the mainland but landward of a line drawn from headland to headland. Defendants' motion to dismiss was based on the ground that the vessel was within the territory of the State of California at the time of the alleged robbery. Judge Stephens adopted the idea that the baseline of the marginal belt runs from headland to headland at bays, rather than following the exact contour of the coast (122). He recognized that there must be some limitation read into this formula and found such limitation in the usage of the word "bays" by governments, explorers and geographers, and he followed *Ocean Industries* v. *Superior Court* in interpretation of the California Constitution. The State of California was not

a party. The position of the United States was the same there as it is here but the decision was against it. In November, 1939, the Supreme Court of California decided in a criminal case (*The People* v. *Anthony Stralla, et al.*, 14 Cal. 2d 617) that defendants had violated the California Penal Code by operating a gambling ship anchored in Santa Monica Bay four miles from shore but approximately six miles landward from a line drawn between the headlands of the bay. The *Ocean Industries* case in the California Supreme Court and Judge Stephens' decision in the *Carrillo* case were both referred to (622, 623, 631, 632). In the Court's very full opinion holding that the vessel was anchored in the territorial waters of California the use of the word "bays" in the Constitution of California was interpreted to include all bays without limitation as to the distance between headlands, and the Fish and Game Code was interpreted in the light of this constitutional interpretation (631). The Court found no established limitation, in international law, of the headland doctrine, citing, as the other decisions had done, the accepted status of Delaware Bay, Conception Bay and Chesapeake Bay (628-630).

The rationale of all the decisions is, I think, directly in conflict with the position which the United States had then taken and now takes in its international relations. The interpretation which prevailed in these cases of the word "bays" in California's Constitution is the same interpretation that Great Britain urged for the word "bays" in the Treaty of 1818, and against which Mr. Root on behalf of the United States vigorously advanced the proposition that the headland doctrine should be limited by the three-mile rule to bays not more than six miles wide; and when the Arbitration Tribunal upheld Great Britain's contention but recommended acceptance by both parties of the ten-mile rule, the United States in the Treaty of 1912 retreated from Mr. Root's position only to the extent of fixing ten miles

as an appropriate limit for the headland doctrine (*ante*, p. 24). It is to be noted, too, that these instances of assertion of right by the State of California in the courts did not constitute an assertion of exclusive authority over these waters such as might be the occasion for objection by foreign governments or action by the United States in our international relations. The *Ocean Industries* cases involved only a matter of regulating fishing which had no exclusive aspects. (*Cf. U. S.* v. *California*, 332 U. S. 37-38 and *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 381). The *Stralla* case and the *Carrillo* case which were criminal actions rested, of course, on the proposition that the area in question was part of the territorial waters of California, but there is nothing to indicate that the defendants were citizens of a foreign country. Under these circumstances, absence of objection from foreign countries cannot be regarded as acquiescence in the position of California, nor, I think, could silence on the part of the United States be interpreted as a concurrence by the United States in its foreign relations with the proposition on which California stood in these cases. As to Delaware Bay, Chesapeake Bay, etc., which in all these cases were regarded by the courts as confirmation of their broad interpretation of the word "bays"; the fact is that in international law these instances are not regarded as a denial of the ten-mile rule. They are regarded in international law as bays which by historical usage have, in accordance with a well established custom in international law, been established as inland waters, notwithstanding the ten-mile rule. (*Cf.* Cal. 1951, 73)

In the *Stralla* case an *amicus* brief was filed by United States Attorney Bel Harrison "acting by direction of the Attorney General of the United States and in the name and in behalf of the United States of America" (Cal. Appendix 3, p. 6). The *amicus* brief supported the position of California. It particularly supported the interpretation of

California's Constitution urged by California (21) and, as the other decisions had done, regarded the recognition of Conception Bay as inland waters as supporting the broad interpretation of the headland-to-headland rule (14, 15), rather than as a particular exception to that rule based on historical grounds. Indeed, the authors of the *amicus* brief adopted in its entirety the "excellent brief of counsel for the people" (12). Counsel for California rely very much upon this incident of the *amicus* brief in the *Stralla* case (Cal. 27, 51). I quite agree that the position taken in that brief is squarely opposed to the position taken by the counsel for the United States here, and so do they (U. S. 132). It is equally clear, however, that the position taken in that brief is squarely in conflict with the traditional position of the State Department in our international relations. If to determine what the true position of the United States is on this subject choice has to be made between this *amicus* brief filed in the California court and the position traditionally taken by the United States *vis-á-vis* foreign nations in our international relations, I should elect to put aside the *amicus* brief.

Rather extensive testimony and arguments were presented before me as to the location of the southeastern headland of San Pedro Bay (Cal. 95-101; U. S. 149-150; and U.S.R. 67-72.) In the *Carrillo* case (13 F. Supp. 121) Judge Stephens located the southeastern headland at the point contended for by the United States. If, contrary to my conclusion, the Court should find that California has established its contention that San Pedro Bay constitutes inland waters, and if the Court further rejects the determination of Judge Stephens in the *Carrillo* case, then I would recommend that the contention of California as to the southeastern headland should be rejected, and the contention of the United States accepted, on the evidence submitted, particularly the testi-

mony of Mr. Shalowitz for the United States (Tr. 1219-1235).

In the brief filed on behalf of California in the *Stralla* case it was asserted that the "body of water lying easterly of the islands adjacent to the coast is within the boundaries of the State of California", but the decision did not deal with that assertion. The ground upon which decision rested was that the vessel was anchored landward of the line from headland to headland. The suggestion in the brief that the boundaries of the State of California embraced the waters between the mainland and the outlying islands was no more than a caveat. It could not, I think, be regarded as an assertion of right that could have any repercussion or effect in our international relations. Counsel for California go even further to urge that the *amicus* brief, when it made a blanket endorsement of the brief for California, constituted an assertion by the United States in the field of international law of right to the exclusive control of the so-called "overall unit" of water, and this even though the *amicus* brief did not mention these waters or the remark about them in California's brief. In making my recommendations I have given no weight to that suggestion.

The contention that the bays, harbors and channels under consideration have been claimed and established as inland waters by California, is discussed by counsel for California in their brief at pages 44-57. The discussion starts with the interpretation of California's Constitution which California successfully pressed in the Courts, and which I have found to be contrary to the interpretation inherent in the traditional position of the United States limiting the headland-to-headland doctrine to bays not more than ten miles wide (*ante* pp. 49-50). Counsel's discussion also refers (47-48) to assertions of exclusive control of the waters off the shore of California by Spain in the eighteenth century and by Mexico in the first part of the nineteenth century, before the

Treaty of Guadalupe Hidalgo. It does not seem to me that these assertions of exclusive control have any significance now. On the contrary, I think they are reflections from the old rule of the closed sea, or *mare clausum*, which in the nineteenth century was replaced by the doctrine of the freedom of the seas—the traditional doctrine of the United States. Counsel also refer (49-50) to cases, which hardly help this point, in the State Courts of California in which the question of the status of waters between the marginal belts of the outlying islands and the marginal belt of the mainland was introduced but not decided (*Ex parte Keil*, 85 Cal. 310 (1890) and *Wilmington, etc.* v. *Railroad Commission*, 166 Cal. 741 (1913); affirmed 236 U. S. 151, 153 (1915) or in which the statutory words "state waters" adjacent Catalina Island were limited to a belt three miles wide. At pages 51 *et seq.* counsel discuss the *Ocean Industries* case and the *Stralla* case including the finding of the California Supreme Court that the county boundaries should be interpreted in harmony with the Court's interpretation of the Constitution. They mention again that "Fish and Game District 19 includes all islands and the waters adjacent thereto lying off the coast of Southern California" but admit that these words "do not explicitly apply to all channel waters between the island and the mainland" (55), and they mention the California statute which makes it a misdemeanor to dump garbage or other waste products within twenty miles of the coast of California, without suggesting, however, that this sanitary regulation amounted to an assertion of exclusive right to waters within twenty miles of the coastline. And finally, counsel refer to the California Act of 1949 (1949 Cal. Stat. Chap. 65) which does indeed constitute an assertion of right, as inland waters, to the water areas here in controversy.

After painstaking consideration of California's position as thus stated in their brief, I conclude that this California

Statute of 1949, two years after the decision of this Court in the *California* case, is the first explicit assertion by California of exclusive authority over these water areas in dispute, or that these water areas constitute inland waters. Furthermore, I accept the contention of counsel for the United States, fully supported by the evidence and fairly stated, I think, in their brief (U. S. 134-148) that California, from 1933 to 1949, by its legislation as to Fish and Game Districts and as to county boundaries has recognized that its seaward boundary in the so-called "unit area" runs three miles from the mainland.

Much of the testimony submitted to the Special Master in these proceedings dealt with the geography, the history and the economic importance of the water area in dispute; Monterey Bay, Crescent City Bay area, San Luis Obispo Bay, Santa Monica Bay and San Pedro Bay, and the so-called "over-all unit area" between the offshore islands and the mainland (Cal. 79-117; U. S. 148-151; U. S. R. 50-78). If there had been any assertion of exclusive jurisdiction of these waters by or on behalf of the United States, then this testimony would in general be relevant to the question whether these areas present special characteristics such as would justify in international law an assertion of exclusive sovereignty. But if my factual conclusions are correct, then the testimony is irrelevant to any issue here presented. I see no point in prolonging this report by any detailed comments on the testimony.

Low-Water Mark

From the point of view of a disputed real estate boundary line, defined as "the ordinary low-water mark", the mean of all of the low tides would certainly be indicated. There would, from that point of view, be no more reason to choose the mean of the lower low tides (as one interested claimant might suggest from self-interest) than to choose the mean

of the higher low tides (as self-interest might likewise move the other claimant to suggest). The middle way—the statistical mean of all the low tides over the cyclical period of approximately nineteen years—would seem to be the only choice of which neither contestant could justly complain. That, I think, was the effect of the decision of the Ninth Circuit Court of Appeals in *Borax* v. *Los Angeles*, 74 F. (2d) 901, 906) expressly approved by this Court on *certiorari* (296 U. S. 10, 26).

But California urges that, from the point of view of national interest and policy with respect to territorial waters, the mean of the lower low tide should be preferred. Here, as well as in connection with the criteria it proposes as to the status of channels and as to the seaward boundary of the inland waters of bays, California advances the proposition that the adoption of the criteria it suggests "would serve the national interest by placing the international domain as far seaward as possible" (Cal. 142). In my recommendations I have rejected that argument because I have not understood that the order of the Court intended that I should express my views on such a question of the foreign policy of the nation. It seems clear to me that the question whether the national interest would best be served by placing the national baseline of the marginal belt as far seaward as possible is one which calls for "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry" (*C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111). But if I am wrong in that, then I must report that the suggestion flies in the face of our traditional policy of freedom of the seas (*United States* v. *California*, 332 U. S. 1934). In any event, there is in the record before me as Special Master no evidence whatever that the policy of the United States is, or ever

has been, to place the baseline as far seaward as possible, nor is there any evidence that that policy would be for the best interest of the United States, or indeed for the best long-time interest of the State of California. To the contrary, counsel for the United States have directed attention to a letter dated April 25, 1952 from the Department of the Navy on behalf of the Department of Defense to the Chairman of the House Judiciary Committee, commenting upon the Joint Resolution, H. J. Res. 373, (U. S. R. Appendix 80-84). In that letter the Under Secretary of the Navy says, that as one of the world's foremost advocates of the doctrine of the freedom of the seas the United States has always advocated the three-mile limit of territorial waters delimited in such a way that the outer limits thereof closely follow the sinuosities of the coastline; that the time-honored position of the Navy is that by thus securing greater freedom and range of its warships and aircraft the United States better protects its security interests, and the letter strongly recommends against the enactment of H. J. Res. 373 which would declare the boundaries of the inland waters of the United States to be as far seaward as is permissible under international law.

California urges, however, that the mean lower low-water mark should be adopted for another reason. It points out that the mean lower low-water mark, as distinguished from the mean of all low waters, is used for all hydrographical surveys and navigation charts of the Pacific Coast; that it is required in all the work of the Corps of Engineers by Section 5 of the Rivers and Harbors Act of March 4, 1915, and that it is also used by the California State Lands Commission (Cal. 141, Tr. 1110-1111). The reason why the mean of the lower low waters is used on navigation charts is, of course, because it is safer and therefore more serviceable to navigators (U. S. 155 and

letter of Feb. 8, 1952 from the Coast & Geodetic Survey to the Solicitor General—Appendix 181, 185-186). It seems clear enough that navigators approaching our coast and interested to locate the outer boundary of the three-mile marginal belt would refer to these official navigation charts (*Cf.* U. S. 156). It would be a matter of convenience to navigators if the marginal belt were measured from a low-water mark based on the mean of the lower low waters as shown on these charts.

The letters from the Secretary of State to the Attorney General (U. S. Appendix 167-175) do not mention this question of fixing the low-water mark, and there is no evidence that the State Department has made any choice in our international relations. The report of the Second Sub-Committee at the Hague Conference included the following sentence:[23]

> "For the purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the coastal state, provided the latter line does not appreciably depart from the line of mean low water spring tide."

The reference here to the mean of the spring tides, rather than to the mean of all the low tides, would indicate that the consensus of the Second Sub-Committee was to prefer a restriction rather than enlargement of encroachment on the open sea; but whether a choice by the United States of the more seaward line based on the mean of the lower low tides would meet with approval by other nations, and whether our traditional policy of the freedom of the seas would outweigh, in determination of the national policy, the matter of convenience just referred to, is a matter of speculation upon which it does not seem profitable for me to enter.

I have, therefore, based my recommendation of the mean

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[23] See *Acts of Conference*, 206.

of all the low tides upon the considerations as to property rights above set forth, believing that a choice of the mean of the lower low tides is a matter of international policy to be determined by the political agencies of government, rather than a matter of judicial determination.

In making this recommendation I have not overlooked the argument of counsel for the United States that this question has already been judicially determined by the Court in its use of the term "ordinary low-water mark" in its decree; that the term "ordinary low-water mark on the coast of California" is the equivalent of "mean low-water mark on the coast of California" and that the technical meaning of the latter term is the intersection with the coast of the plane of the mean of all the low tides rather than the plane of the mean of the lower low tides (U. S. 151 *et seq.*). It is of course true that the datum plane of all the low waters and also the datum plane of the lower low waters has been established, and each of these planes is made use of under appropriate circumstances. Mr. Marmer, an outstanding authority, testified that though the expression "ordinary low water" is not a technical term it is understood "to mean average or mean low water," and has the same meaning as "mean low water" (Tr. 58). I think his testimony establishes that to a man skilled in the art the law expression "ordinary low water" would be taken to mean the same thing as the more exact technical term "mean low water". But nothing has been brought to my attention to indicate that this Court when it used the expression "ordinary low water" in its decree purposely intended to choose the mean of all the low waters as distinguished from the mean of the lower low waters, or that the Court in the principal case judicially resolved the question now in dispute. I have been unable to conclude that that question has already been judicially determined. If, however, I am wrong in that,

the correction of my error would lead to the same conclusion that I have recommended on other grounds.

There is one further question that has to be determined before the chosen low-water mark can be located by actual survey. That is the question whether the surveyors are to take the low-water mark as it exists today; or whether allowances are to be made for natural or artificial modifications of the shoreline. The parties agree that natural accretions and relictions are to be disregarded. The question is thus narrowed to artificial changes in the shoreline including artificial fills and structures; and artificial structures include outer harborworks as well as inner harborworks.

The question as to artificial structures has further been narrowed by the recommendation of counsel for the United States, that with respect to natural accretions added by gradual and imperceptible processes to the shoreline as a result of the presence of artificial structures, this Court should follow the so-called United States rule (See *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66-69; *Cf. Oklahoma* v. *Texas*, 265 U.S. 493, 495) rather than the California rule (*Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d 772, 787-794; 147 P. 2d 964, 972-975). Under the United States rule such natural accretions to tidelands accruing from artificial structures belong to the riparian owner of the accreted land. Since that is also California's position in the present controversy, the parties are in agreement that such accretions belong to California rather than to the United States. This further narrows the dispute down to the question of the dominion and power over the lands, minerals and other things underlying the actual artificial structures or within areas between newly constructed outer harborworks and original inner harborworks. And even as to the first part of this narrowed question, the United States has taken the position, as I pointed out in my report of May 22, 1951 (p. 33), that it does not claim title to them; that it has drafted

a bill which has been introduced in Congress to make clear that "it does not expect to under any circumstances claim or assert title or take over any improvements which may have been made by the State or by any political subdivision of the State".

Counsel for the United States base their contention that the United States retains full dominion and power over the lands, minerals and other things underlying these artificial projections and harbor areas within the more recently constructed outer harborworks, upon what they regard as the accepted rule of law that artificial changes in the shoreline, either in the nature of reclaiming land or constructing barriers which enclose water areas, do not change the title to the land affected by the improvements (Br. 100-101). They cite a number of cases in the courts of California, New Jersey, New York and Iowa to this effect.

California, on the other hand, contends (Cal. 123-132 and 134 *et seq.*) that these cases involving title to filled lands are not applicable in connection with the location of the marginal belt. Its position is that the full dominion and power of the United States rests, under the decision in the principal case and the decisions in the *Texas* and *Louisiana* cases, upon the national interests, national responsibilities and national concern in matters of external sovereignty which rest in the United States in connection with the water area of the three-mile marginal belt; not in the area in which these responsibilities might have existed in 1850 or at any other time in the past but upon the responsibilities which now exist (Cf. *U. S.* v. *Louisiana*, 339 U.S. 704).

In my recommendation I have rejected the position of the United States and accepted the position of California, believing that the California position is the legally sound one. I have been fortified in this conclusion by two ancillary considerations: The first of these is that the United States has full control of the erection of any such artificial accretions,

because of its control of navigable waters. I think it may be assumed that in the past the question of the ownership of the lands, minerals and other things underlying these artificial accretions has not been taken into consideration by the United States in passing judgment upon whether the accretions will be permitted; but it seems clear that in the future that aspect of the matter can be, and probably will be, taken into account. I do not share the view of counsel for the United States (U.S. 102) that this would be an undesirable situation. On the contrary, I think it would give opportunity for appropriate negotiations and agreement between the State and the United States at the time the artificial change is approved.

Harbors

The second of these ancillary considerations, applicable particularly to the question of outer harborworks, is that the position of the United States leads to an anomalous and I think unsound conclusion. Counsel for the United States admit (U.S. 101) that at The Hague Conference of 1930 the United States proposed and the Second Sub-Committee recommended that the baseline of the marginal belt should at harbors be the "outermost permanent harbourworks", and they say that "* * * it is probably still the position of the United States that the completion of permanent harbor works carves the particular area out of the high seas and vests complete control in the nation owning the mainland; and in that respect makes the area 'inland water'." They contend, however, that this does not mean that in the internal relation between the states and the federal government title would pass. They say that, on the contrary, under the rule of title to real estate above referred to, title would not pass and would remain in the United States rather than pass to California. They do not suggest that there is any authority or precedent in domestic or interna-

tional law for thus attributing a double status to these water areas. In my opinion, the contention that the boundaries of the marginal belt are at one place as between the United States and an individual State and at another, different place as between the United States and a foreign nation, is unsound on the general principle underlying the judgments in the principal case and the *Texas* and *Louisiana* cases.

Finally, there is, in my opinion, another fallacy in the position taken by the United States with respect to the extent of inland waters at harbors. The concept of a port or harbor necessarily includes anchorage area for vessels that load and unload without docking or vessels that are waiting for dock space; just as the concept of a railroad terminal includes switching yards and waiting rooms. Counsel for the United States (U.S. 101, 107) take the position that the baseline of the marginal belt should be so drawn as to include only anchorages which are protected by the natural configuration of the coast; that it should exclude anchorages which are sheltered by, or in which a deficient natural sheltering is supplemented by, the artificial construction of a breakwater. No authority or precedent is cited for this conclusion, and it does not seem to me a reasonable one. It would be a particularly hard rule on a coast like that of California on which nature has afforded relatively little shelter. I think it is in conflict with the generalized consensus of the Second Sub-Committee at The Hague Conference that the outermost harborworks should be excluded from the marginal strip of open sea. It can safely be assumed that wherever an artificial breakwater is erected (always with the consent of and usually by the Corps of Engineers) the breakwater is planned to include a reasonable, adequate anchorage for the port in question. It is for these reasons that I have recommended that in front of harbors the outer limit of inland waters should embrace an

anchorage reasonably related to the physical surroundings and the service requirements of the port, and, absent contrary evidence, may be assumed to be the line of the outermost harborworks.

Respectfully submitted,

WILLIAM H. DAVIS.

New York, New York, October 14, 1952.

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